Supreme Court, U.S.
FILED

No. 93-1164 JAN 10 1994

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IN THE

Supreme Court of the United States

October Term, 1993

THERESA A. LaPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LaPAGE, Individually,

Petitioners,

against

LYNNE Di COSTANZO, M.D., REUVEN LEVY, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Respondents.

APPEAL FROM THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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(3628—1994)
Printed on Recycled Paper

35 pp

Question Presented For Review

Does the due process clause and the equal protection clause of the 14th Amendment of the United States Constitution give a full-term viable fetus the right to sue for malpractice, when this full-term child was not born alive but was alive eighteen minutes before its cesarean section delivery (when the malpractice claimed was a failure to promptly perform the cesarean section)?

List of All Parties to the Proceeding in the Court Whose Judment is Sought to be Reviewed.

The names of all of the parties to the proceeding in the Court whose Judgment is sought to be reviewed appear in the caption of the case.

The two corporate parties, the hospital and the doctor professional corporation, have no parent or subsidiary companies.

Table of Contents

Page

Question Presented i

List of All Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed ii

Table of Authorities v

Official and Unofficial Reports of Opinions Delivered in the Case by Other Courts or Administrative Agencies 1

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked 1

Constitutional Provisions Treaties, Statutes, Ordinances and Regulations Involved 2

Statement of the Case 4

This is Review of a State Court Judgment 7

Argument Amplifying the Reasons Relied on for Allowance of the Writ 8

Index to Appendix

New York State Court of Appeals Order, December 15, 1993..... A1

New York State Court of Appeals Decision, December 15, 1993..... A3

New York State Court of Appeals Decision, September 14, 1993..... A4

Appellate Division Memorandum and Order, June 17, 1993..... A5

Excerpts from Supreme Court Order Appealed From, October 17, 1992..... A8

Excerpts from Memorandum of Law Submitted to Supreme Court, Franklin County..... A10

Excerpts from Appellate Division Brief..... A12

Excerpts from Jurisdictional Statement Submitted to New York State Court of Appeals..... A15

Letter from Richard E. Murphy, M.D. of December 20, 1990..... A17

TABLE OF AUTHORITIES

Page

CASES:

Elks National Foundation v. Weber (1991), Ca. 9 Mont. 942 F2d 1480 ..... 1, 2

Endresz v. Friedberg, *et al.*, 24 N.Y.2d 478 ..... *passim*

Mississippi Power and Light Co. v. Mississippi, *et rel.*, 487 U.S. 354, 101 L.Ed2d 322 2

Muschetti v. Charles Pfitzer & Co. (1955), 208 Misc. 870, 144 N.Y.S.2d 235 ..... A10

Planned Parenthood of Southeastern Pennsylvania, *et al.* v. Casey, U.S. Lexis 4751; 60 U.S.L.W. 4795 9

Roe v. Wade, 410 U.S. 113 9

Tebbutt v. Virostek, 65 N.Y.2d 931, 483 N.E.2d 1142 ..... *passim*

Witrak v. Nassaw E.R. Co. (1900), 52 A.D. 234, 65 N.Y.S. 257 ..... A10

Woods v. Lancet (1951), 303 N.Y. 349, 102 N.E.2d 691, 27 ALR2d 1250, written by Judge Cardoza 3, 8, A12

Page

STATUTES:

Estate Powers and Trust Law of the State of New York, §5-4.1 3

Title 28 U.S. Code §1257(a) 1

U.S. Constitution Amendment 14, Section 1 2

PETITION FOR WRIT OF CERTIORARI

Official and Unofficial Reports of Opinions Delivered in the Case by Other Courts or Administrative Agencies.

Defendants moved in New York State Supreme Court for Summary Judgment in the above-captioned medical malpractice case dismissing Ashley Marie Jenkins' cause of action for wrongful death. See excerpts of Order in Appendix (A8-A9). This was granted. Upon appeal, the Appellate Division of the New York State Supreme Court, Third Judicial Department affirmed the lower Court Order on June 17, 1993. The Appellate Division Memorandum and Order appears in the Appendix at (A5-A7). An application was made to the New York State Court of Appeals for permission to appeal on Federal and State Constitutional Grounds. This application was denied on September 14, 1993 (A4). Subsequently, an application was made for permission to appeal to the New York State Court of Appeals and this was denied on December 15, 1993 (A1-2).

Statement of the Grounds on Which the Jurisdiction of this Court is Invoked.

(i) Decision of the Appellate Division, Third Judicial Department dated June 17, 1993.

(ii) Not Applicable.

(iii) Not Applicable.

(iv) The statutory provision believed to confer jurisdiction on this Court is Title 28 U.S. Code §1257(a); *Elks*

National Foundation v. Weber (1991), Ca. 9 Mont. 942 F2d 1480; *Mississippi Power and Light Co. v. Mississippi, et rel.*, 487 U.S. 354, 101 L.Ed.2d 322.

The Decision and Order sought to be reviewed is that of the Appellate Division of the New York State Supreme Court, Third Judicial Department, dated June 17, 1993, which was based upon the law of the State of New York as enunciated in *Endresz v. Friedberg, et al.*, 24 N.Y.2d 478 and *Tebbutt v. Virostek*, 65 N.Y.2d 931; 483 N.E.2d 1142. These Decisions hold that unless a child is born alive, even though it is a viable fetus at the time it sustained injury, it has no rights to sue, despite the fact that the delay in its cesarean section delivery amounted to medical malpractice. In fact, if a child survives the cesarean section by one second, it has a right to sue and if it dies as a result of the medical delay (which is the basis of the negligence) one second before the cesarean delivery, it has no right to sue.

Constitutional Provisions, Treaties Statutes, Ordinances and Regulations Involved.

United States Constitution, Fourteenth Amendment, Section 1:

Section 1. Citizens of the United States.

> "All *persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor* shall any State deprive any *person* of life, liberty, or property,

without due process of law; *nor* deny to any *person* within its jurisdiction the equal protection of the laws."

Endresz v. Friedberg, et al., 24 N.Y.2d 478

Tebbutt v. Virostek, 65 N.Y.2d 931; 483 N.E.2d 1142

Woods v. Lancet (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250, written by Judge Cardoza

Estate Powers and Trust Law of the State of New York

§5-4.1. "Action by personal representative for wrongful act, neglect or default causing death of decedent.

The personal representative, duly appointed in this State or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing any executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit."

* * *

Statement of the Case.

Petitioners commenced an action against the Respondents for malpractice alleged to have occasioned the death of their daughter, Ashley Marie Jenkins, on February 9, 1989.

On the evening of February 9, 1989, Dr. Reuven Levy had been called by Respondent Lynne Di Costanzo, M.D. to assist in a Cesarean Section of the Petitioners' Intestate Ashley Marie Jenkins' mother Theresa A. LaPage. He assisted by retracting the tissues for the Respondent Lynne Di Costanzo, M.D. He opined that the baby was dead when born. The baby was given to the pediatrician, Ira M. Weissman, M.D., who examined the baby and indicated that there was no heartbeat and that the baby was dead.

The Operating Room Circulating Nurse, Don McKenzie, testified that he was in the Operating Room at 6:30 in the evening on February 9, 1989 with Scrub Nurse, Lucy Gillette, and with William McCarthy, the Nurse Anesthetist. He testified that they summoned Dr. Lynne Di Costanzo, Dr. Levy and Dr. Weissman.

The pediatrician and the doctors arrived at 6:35 p.m. He testified further at 6:37 p.m. the incision was made and that the anesthesia was administered at 6:35 p.m. He testified the delivery time was 6:43. He could observe no life in the baby at that time. He said that the cord was cut and the baby was placed in a sterile towel and was placed in a kriselman. He testified that Dr. Ira Weissman, the Pediatrician, used a stethoscope, listened for a heartbeat and intubated the baby. He testified further that the baby was pronounced dead at 7:00 o'clock, having been delivered at 6:43 p.m.

Tammy Lynn Reynolds testified that she was a Registered Nurse in Obstetrics on February 9, 1989 working the three to eleven thirty shift. She testified that the Petitioners' intestate's mother came into the hospital at five minutes after four in the afternoon on February 9, 1989. She testified that after the baby was born she weighed the baby and recorded the weight at seven pounds fourteen ounces (7# 14 ozs.). She testified that she took the baby's footprints, measured her, gave her a bath, put a t-shirt and a hat on her and wrapped her in a blanket. She testified that Dr. Weissman came into the Nursery and examined the baby before she did this. She further testified that she brought the baby to her mother.

Linda Marie Bouissey testified that she was the Evening Supervisor of the Respondent Alice Hyde Memorial Hospital on February 9, 1989 working from three in the afternoon to eleven thirty in the evening. She testified that she was paged to go to the Operating Room to assist Dr. Ira Weissman, the Pediatrician. She put an intravenous in the baby after the baby was born. She said Dr. Weissman was doing cardiac compressions on the baby, Will McCarthy was ambu bagging the baby and that Dr. Weissman pronounced the baby dead at 7:00 o'clock. She said that the baby was blue and limp.

Lucille Gillette testified that on February 9, 1989, she was an LPN having worked the shift from seven to three and that she was on-call for Emergency Room cases that evening. She was called in on this case and she was there and ready to start after 6:00 p.m. She said that Petitioners' Intestate's mother came into the Operating Room at 6:30 p.m. She said after the incision, Respondent Lynne Di Costanzo, M.D. pulled the baby's head out while Dr. Reuven

Levy was pushing down on the top part of the abdomen. She described the baby as "very flaccid". She said Respondent Lynne Di Costanzo, M.D. cut the cord which was around the baby's neck.

Dr. Ira Weissman the Pediatrician, testified that on February 9, 1989, according to his notes, the baby had a triple nuchal cord, which was very tight, wrapped around the neck three times and that the baby was covered with meconium both outside and in the oral cavity. He initiated CPR by intubating the baby, gave the baby oxygen and breathing for the baby with an ambu bag. Dr. Weissman further testified that the baby was born at 6:43 p.m. and intubated at 6:45 p.m. and pronounced dead at 7:00 o'clock. Dr. Weissman testified that he didn't hear a heart rate, breathing sounds or observe spontaneous movement. He testified that the baby's footprints were on the hospital chart.

William McCarthy testified that he was a Nurse Anesthetist working at the Respondent Alice Hyde Memorial Hospital on February 9, 1989. He administered the anesthesia and the baby was born through an incision in the uterus. He said that he saw that the baby had the cord wrapped around its neck several times.

Deborah Burrell Merrick testified that she was a *Registered Nurse* employed by the Respondent Alice Hyde Memorial Hospital on *February 9, 1989 working the three to eleven thirty shift. She said she was the nurse on duty when the Petitioners' Intestate's mother was admitted around ten minutes to four that afternoon.* She stayed with her on the Obstetrical Floor until she was brought into the Operating Room. *She says that at 5:45 p.m. the Respondent Lynne Di Costanzo, M.D., made a decision to do a cesarean section.*

She testified that Petitioners' Intestate's mother left the Obstetrical Floor to go to the Operating Room at 6:25 p.m. She says at that time there was a *fetal monitor in place that did not go downstairs to the Operating Room and that at 6:25 p.m. the fetal monitor was taken off the baby. She says that this fetal monitor was in place from the time of the rupture of the membranes (the breaking of the mother's water). The internal monitor was placed at 5:33 p.m. on the baby and was there until 6:25 p.m. and that at 6:25 p.m. the fetal heart was recording. This was thirty-five (35) minutes before the baby was pronounced dead, and, eighteen (18) minutes before the alleged stillborn delivery.*

The *cause of the infant's death was strangulation by the umbilical cord.* The strangulation was *caused by the delay in delivery.* The delay in delivery was negligence on the part of the health professionals. *Had the child been delivered timely, it would have been born alive. The child was alive within minutes of its actual cesarean delivery.*

The Courts below have held, in effect, that the Estate of Ashley Marie Jenkins has no cause of action since the child died within eighteen (18) minutes of her actual cesarean delivery.

This is Review of a State Court Judgment.

The same Federal questions that are raised here were raised in the New York State Supreme Court in opposition to the Motion for Summary Judgment on Appeal to the Appellate Division, Third Judicial Department and in the Application to the New York State Court of Appeals for review of the Appellate Division Decision on Constitutional

grounds. These questions were raised in the briefs and answers submitted to the State Courts. The following are excerpts of the raising of these questions:

See Appendix (A8-A16)

Argument Amplifying the Reasons Relied on for Allowance of the Writ.

The court-appointed representatives of the deceased, Ashley Marie Jenkins, by judicial fiat under the authority of the *Endresz* and *Tebbutt* cases, cited herein, are denied rights to sue accorded to a *person* who lives eighteen (18) minutes longer than she did. The medical professionals were responsible for her delayed birth. If the child were born alive, she would have an action. *Woods v. Lancet* (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250, written by Judge Cardoza.

Ashley Marie Jenkins was a full-term birth, alive with a detectible heartbeat at 6:25 p.m. on February 9, 1989. She was delivered by cesarean section at 6:43 p.m. on February 9, 1989 with no detectible life signs, and pronounced dead at 7:00 p.m. on February 9, 1989, by the medical professionals.

Ashley Marie Jenkins had a legal personality from the time of her viability until the time she was delivered and apparently dead. She has been deprived of her life without due process or the right to sue accorded others who, when delivered by cesarean section, had signs of life.

Ashley Marie Jenkins was not accorded the rights of other tortiously injured children simply because her birth

was delayed. The delay is the basis of the suit and it was occasioned by the carelessness of the medical professionals.

She may not have been a citizen, since she was not yet born, but she certainly was a *person* and as a *person* she was entitled to the rights accorded other persons by the due process and equal protection clauses of the United States Constitution. The State of New York, by judicial decision, terminated the Constitutional rights of Ashley Marie Jenkins and her Estate.

The *Endresz* and *Tebbutt* cases are constitutionally wrong. They opined that the child can't sue until it sees the light of day. They are also medically wrong, since all children are born blind.

This Court, in *Roe v. Wade*, 410 U.S. 113 and in *Planned Parenthood of Southeastern Pennsylvania, et al. v. Casey*, 1992 U.S. Lexis 4751; 60 U.S.L.W. 4795, recognizes the right of a woman to choose the termination of an unwanted pregnancy. It is indicated in some of the language of these opinions, that this right terminates with fetal viability and only exists in pre-viability cases.

The medically delayed birth of Ashley Marie Jenkins through a late surgical incision did not make Ashley Marie Jenkins a *person*. She was a *person* when she achieved viability. She was viable and in obvious fetal distress

eighteen (18) minutes before her cesarean birth. A copy of the medical opinion attesting to malpractice is attached in the appendix at (A17-A18).

Respectfully submitted,

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APPENDIX.

Court of Appeals Order, December 15, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Fifteenth day of December, 1993.

Present:

Hon. Judith S. Kaye, Chief Judge, presiding

THERESA A. LAPAGE, & C., *et al.*,

Appellants,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1161
3-10

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted

thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Court of Appeals Decision
December 15, 1993

STATE OF NEW YORK
COURT OF APPEALS

THERESA A. LAPAGE, & C., *et al.*,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1161
3-10

Motion for leave to appeal denied.

Court of Appeals Decision,
September 14, 1993

STATE OF NEW YORK
COURT OF APPEALS

THERESA A. LAPAGE, & C., *et al.*,

Appellants,

v.

LYNNE DICOSTANZO, & C., *et al.*,

Respondents.

Mo. No. 1017
SSD 55

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved

Judge Levine took no part.

A5

Appellate Division Memorandum and Order
June 17, 1993

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: June 17, 1993

67246

THERESA A. LAPAGE, Individually and as Natural Parent and Limited Administrator of the Estate of ASHLEY M. JENKINS, Deceased, *et al.*,

Appellants,

v.

LYNNE DiCOSTANZO, *et al.*,

Respondents.

Calendar Date: April 21, 1993

Before: Mikoll, J.P., Yesawich Jr., Mercure, Crew III and Harvey, JJ.

O'Connell, Wolfe & O'Connell (J. Byron O'Connell of counsel), Plattsburgh, for appellants.

Michael Saunders Law Office (Kenneth Mauro, Great Neck, of counsel), New York City, for Lynne DiCostanzo, respondent.

Martin, Ganotis, Brown, Mould & Currie, P.C. (David R. Klotz of counsel), Syracuse for Reuven Levy, respondent.

Conboy, McKay, Bachman & Kendall (William F. Maginn Jr., of counsel), Canton, for Alice Hyde Memorial Hospital, respondent.

Harvey, J.

Appeal from an order of the Supreme Court (Plumadore, J.), entered October 26, 1992 in Franklin County, which, *inter alia*, granted defendants' motions for summary judgment dismissing the first cause of action.

On the evening of February 9, 1989, Reuven Levy was called in by defendant Lynne DiCostanzo, to assist in a Caesarean section delivery of a full-term fetus carried by plaintiff Theresa A. La Page. By the time it was delivered, however, the baby was already dead. La Page and the baby's father thereafter commenced this action against defendants alleging one cause of action for wrongful death on the baby's behalf and a second cause of action by La Page alone for her claimed damages arising out of defendants' actions. Following joinder of issue, all defendants separately moved for summary judgment requesting, *inter alia*, that the wrongful death action be dismissed on the basis that New York does not recognize a wrongful death cause of action for a stillborn child. Although in opposition to these mo-

tions plaintiffs initially argued that their baby was born alive, it was ultimately conceded that the baby was stillborn and plaintiffs instead argued for a modification of the current law. Supreme Court thereafter dismissed the wrongful death cause of action and this appeal by plaintiffs ensued.

We affirm. Plaintiffs do not dispute the fact that the law in New York is that no wrongful death cause of action exists on behalf of a stillborn fetus (*see, Endresz v. Friedberg*, 24 NY2d 478, 482-487; *see also, Tebbutt v. Virostek*, 65 NY2d 931, 933; *Raymond v. Bartsch*, 84 AD2d 60, *lv denied* 56 NY2d 508). While plaintiffs raise several interesting arguments in support of their claim that the law should be changed, this court has stated before that reconsideration of the law established in *Endresz v Friedberg (supra)* "must be addressed to the Legislature or the Court of Appeals" (*Raymond v Bartsch, supra*, at 62). Accordingly, we cannot conclude that the wrongful death cause of action was inappropriately dismissed *(see, Indilicato v Bellevue Maternity Hosp.*, 108 AD2d 997).

Mikoll, J.P., Yesawich Jr., Mercure and Crew III, JJ. concur.

ORDERED that the order is affirmed, without costs.

Order Appealed From, October 17, 1992

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF FRANKLIN.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as natural parents and limited administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants.

ORDERED, ADJUDGED AND DECREED, that the first cause of action, a cause of action for wrongful death as to he deceased infant plaintiff ASHLEY MARIE JENKINS, is severed from the remaining cause of action, and it is further

ORDERED ADJUDGED AND DECREED, that as aforesaid severed first cause of action is in all respects dismissed; and it is further

ENTER, in
County of Franklin

/s/ JAN H. PLUMADORE
Supreme Court—Franklin County

Order docketed as a Judgment
this 17th day of October, 1992.

Memorandum of Law

STATE OF NEW YORK, SUPREME COURT

COUNTY OF FRANKLIN.

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods, Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiff,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY, PHYSICIAN, P.C. and ALICE HYDE MEMORIAL HOSPITAL,

Defendants.

It is respectfully submitted that the law as enunciated, albeit correctly, by the defendants, is wrong and it is time to change the law. The law is based on the decision of law in *Endresz v. Friedberg,* 24 N.Y.S.2d 478 and *Tebbutt v. Virostek,* 65 N.Y.S.2d 931, two (2) Court of Appeals cases and *Witrak v. Nassaw E.R. Co.* (1900) 52 A.D. 234, 65 N.Y.S. 257; *Muschetti v. Charles Pfitzer & Co.* (1955) 208 Misc. 870, 144 N.Y.S. 2d 235.

What we are urging is that, since the fetus was viable and almost born, it had a legal personality sufficient to permit this cause of action.

What we are urging is that, the rule be changed which produces the absurd result that a child, who is badly injured, but born alive, can recover, while an unborn child, who is more severely injured and dies, can recover nothing.

The Constitution in Amendment 14 thereof provides:

> "All persons *born* or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any state deprive any *person* of life, liberty, or property, without due process of the laws; nor deny to any *person* within its jurisdiction the equal protection of the laws."

Since this child was capable of existence, independent of the mother, it was a *person* and it was entitled to the same rights as any other *person* and it was entitled not to be deprived of its life without due process of law.

Until it reached liability, perhaps one could argue it was an adjunct of the mother, but once it achieved viability, it was entitled to the same rights as any other *citizen* or *person,* the right not to have a tort committed upon it and the right not to be discriminated against in favor of those less severely injured.

Appellate Division Brief,
November 24, 1992

STATE OF NEW YORK, SUPREME COURT
APPELLATE DIVISION,
THIRD JUDICIAL DEPARTMENT

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs/Appellants,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants/Respondents.

Certainly if the child is born alive, it has an action for prenatal tort [See *Woods v. Lancet* (1951), 303 N.Y. 349; 102 N.E.2d 691; 27 ALR2d 1250].

This infant, Plaintiffs/Appellants' Intestate Ashley Marie Jenkins was alive and had a heart beat at 6:25 p.m. The infant was born eighteen (18) minutes later at 6:43 p.m., and pronounced dead at 7:00 p.m. after efforts to resuscitate the infant failed.

It is the argument of counsel for the Plaintiffs/Appellants' Intestate's representatives that the law as enunciated in the Court below is wrong and it is time to change the law.

The law is based upon the two (2) decisions of *Endresz v. Friedbert, et al.*, 24 N.Y.2d 478 and *Tebbutt v. Virostek*, 65 N.Y.2d 931; 483 N.E.2d 1142.

What we are urging this Court, as we urged the Court below, is that this child was alive and viable within eighteen (18) minutes of being separated from its mother. It had a legal personality (despite the *Endresz* case) sufficient to permit a cause of action for wrongful death and conscious pain and suffering. We urge that separation from the mother, in birth, should not be the sole criteria for a cause of action for wrongful death. We urge that there was a wrong committed to Plaintiffs/Appellants' Intestate Ashley Marie Jenkins and there must be a remedy. We urge that when a medical professional commits negligent acts producing death, that medical professional should not be immune from a lawsuit. If the same medical professional badly injured an infant and the infant was born alive the medical professional would be liable.

Amendment 14 of the United States Constitution uses the word "born" or naturalized in describing persons who are citizens. It goes on to say that the State cannot deprive any *person* of life, liberty or property without due process of law, nor, deny to any person equal protection of the laws. We submit that the classification of a child alive and capable of being born within eighteen (18) minutes as having no cause of action and in allowing the mentally defective child born alive to have a cause of action is an arbitrary and unjust discrimination and does deprive the stillborn of equal protection under the law and further does deprive the stillborn of its life without due process of law.

This infant was viable and capable of existence without its mother when the tort was committed. The fetal monitor tapes and the testimony of the Nurse on the Obstetrical Floor substantiate this. Since this infant was capable of existence, it was a person entitled to the same rights as any other person and was entitled not to be deprived of its life without due process of law.

Jurisdictional Statement

STATE OF NEW YORK, COURT OF APPEALS

THERESA A. LAPAGE and GREGORY KENT JENKINS, as Natural Parents and Limited Administratrices of the Goods Chattels and Credits of ASHLEY MARIE JENKINS, Deceased, and THERESA A. LAPAGE, Individually,

Plaintiffs/Appellants,

against

LYNNE DI COSTANZO, M.D., REUVEN LEVY PHYSICIAN, P.C., and ALICE HYDE MEMORIAL HOSPITAL,

Defendants/Respondents.

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infant was born alive, the medical professionals would be liable.

Amendment 14 of the United States Constitution uses the word "born" or naturalized in describing persons who are citizens. It goes on to say that the State cannot deprive any *person* of life, liberty or property without due process of law, nor, deny to any *person* equal protection of the laws. We submit that the classification of a child alive and capable of being born within eighteen (18) minutes as having no cause of action and in allowing the mentally defective child born alive to have a cause of action is an arbitrary and unjust discrimination and does deprive the stillborn of equal protection under the law and further does deprive the stillborn of its life without due process of law.

Perhaps before viability, it was an adjunct of the mother, but, once it achieved viability, the infant was entitled to the same rights as any other citizen or person and entitled to the right not to have a tort committed upon it and entitled to the right not to be discriminated against in favor of those who lived an additional eighteen (18) minutes.

In January 20, 1993, the Journal of the American Medical Association reported a positive association between malpractice claims and the rate of Caesarean Delivery (Relationships Between Malpractice Claims and Cesarean Delivery, JAMA, Vol. 269, No. 3). Personal Injury Verdict Reviews Volume 1, Issue 8, April 22, 1993, indicates that medical malpractice claims for infants injuries in birth average $2,000,000.00 by jury award. It would certainly be cheaper for the medical profession to let the fetus die. This is the effect of the *Endresz* and *Tebbutt* cases.

Letter from Richard E. Murphy, M.D.
December 20, 1990

Mr. J. Byron O'Connell
O'Connell, Wolfe and O'Connell
Attorneys at Law
10 Healey Avenue
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Plattsburgh, New York 12901

Re: Theresa A. LaPage
DOB: 9/13/60

Dear Mr. O'Connell:

American College of Obstetrics and Gynecology standards of care for emergency Cesarean Section is that if a hospital is going to be in the practice of giving obstetrical care, it must be able to perform an emergency Cesarean Section and deliver the baby within 30 minutes of the decision to perform the Cesarean Section.

In reviewing the records of Theresa LaPage, she was admitted into the hospital at 16:00 p.m. (4:00 p.m.) on 2/9/89. This date and time was taken from the hospital admission form. A consent form was signed at 16:45 p.m. (4:45 p.m.).

First progress note was timed at 17:20 p.m. (5:20 p.m.). It was noted that the patient had ruptured membranes, meconium, and suspicious monitor. At 17:45 p.m. (5:45 p.m.), the decision was made to perform a Cesarean Section. According to ACOG standards, the baby should have been delivered before 18:15 p.m. (6:15 p.m.). The operative report states that the patient went in the operating room at 18:25 p.m. (6:25 p.m.). and the incision was made at 18:37

p.m. (6:37 p.m.). The baby was delivered at 18:43 p.m. (6:43 p.m.), exactly 58 minutes after the decision to perform a Cesarean Section was made. Again, according to ACOG, if a Cesarean Section is indicated because of acute fetal problems, these babies should be delivered in 30 minutes or less.

According to the records, we have a deviation from the standards of obstetrical care that resulted in a fresh stillborn. It is not clear from the records why Cesarean Section was not performed in sufficient time.

If you have any further questions, please feel free to contact my office.

Sincerely,

Richard E. Murphy, M.D.

REM/lls